Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Thomas Bruce Vest, M.D.,	)	DATE: January 6, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-110
	)	Decision No. CR453
The Inspector General.	)	
	)	

DECISION

I conclude that Petitioner, Thomas Bruce Vest, M.D., is subject to a five-year minimum mandatory period of exclusion from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.[1]

I. Procedural History

By letter dated January 23, 1996, the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Petitioner that he was being excluded for five years from participation as a provider in Medicare and Medicaid. The I.G. advised Petitioner that he was being excluded as a result of his conviction of a crimiral offense related to the delivery of an item or service under the Medicare program and that the exclusion of individuals convicted of such offenses is mandated by section 1128(a)(1) of the Social Security Act (Act).[2] The I.G. further advised Petitioner that, for exclusions imposed pursuant to section 1128(a)(1), section 1128(c)(3)(B) of the Act mandates a five-year minimum period of exclusion.

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[1] Unless otherwise indicated, hereafter I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

[2] Those parts of the Act discussed herein are codified in 42 U.S.C. § 1320a-7.

By letter dated February 5, 1996, Petitioner filed a request for hearing. In his request for a hearing, Petitioner asked that his exclusion be stayed pending a decision by the United States Court of Appeals for the Seventh Circuit in the appeal of his criminal conviction. In a telephone prehearing conference which I convened on March 6, 1996, the I.G. argued that, as a matter of law, a mandatory exclusion imposed pursuant to section 1128(a)(1) of the Act becomes effective 20 days after notice and continues in effect until an administrative law judge issues a decision finding that the I.G. lacked authority to impose the exclusion or until the conviction underlying the exclusion is reversed or vacated. Petitioner nevertheless requested the opportunity to brief the issue of whether the administrative law judge has authority to stay the effect of an exclusion. Petitioner filed a brief and a supplemental brief on this issue. The I.G. filed a motion for summary disposition, in which she argued also that the administrative law judge lacks authority to stay the effect of a mandatory exclusion. Petitioner responded, opposing the I.G.'s motion for summary disposition. On August 28, 1996, I issued an order directing the parties to supplement the record. The parties filed supplemental submissions in response to my order.[3]

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[3] In this Decision, I refer to the parties' submissions as follows:

Petitioner's Submission	Abbreviation
The ALJ Has the Authority to Stay the Exclusion...	P. Stay Br.
Supplemental Brief in Support of Motion to Continue...	P. Cont. Br.
Response to Respondent's Motion For Summary Disposition	P. Resp. Br.
Response to Respondent's Supplemental Brief	P. Supp. Br.
I.G. Submission	
Respondent's Motion for Summary Disposition	I.G. Br.
Respondent's Supplemental Brief	I.G. Supp. Br.
Respondent's Motion to Supplement	I.G. Mot.

By motion dated November 7, 1996, the I.G. requested to further supplement the record. The I.G. attached to her motion the I.G.'s proposed exhibit 8.[4]

Petitioner has not objected to the I.G.'s motion to supplement the record nor to the admission into evidence of the exhibits submitted by the I.G. The I.G. has not objected to the admission into evidence of the exhibits submitted by Petitioner.[5] In the absence of objection, I grant the I.G.'s motion to supplement the record, and I admit into evidence I.G. Exhibits (Exs.) 1 through 8, and P. Exs. 1 through 5.

After careful consideration of the briefs and documentary evidence submitted by the parties, I conclude that, to the extent there are facts in dispute, I am able to resolve them based on the written record before me, without the need for an in-person hearing. Based on the record before me, I conclude that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act. Accordingly, I affirm the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid for a period of five years.

II. Issues

The issues are: 1) Whether Petitioner's exclusion may be stayed pending the outcome of his appeal of his conviction; 2) whether Petitioner was convicted of a criminal offense under federal or State law; and 3) if

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[4] I have renumbered the pages of I.G. Ex. 8, from 1 through 15.

[5] Petitioner attached three documents to his opening brief. Two of them were marked as "Ex. #A" and "Ex. B." The third document, a letter dated March 7, 1996, from Petitioner's attorney to Michael T. Dyer, Regional Inspector General, was unmarked. Petitioner attached an affidavit of his attorney to his Response to the I.G.'s motion for summary disposition. The affidavit was unmarked. Petitioner attached excerpts from the transcript of his criminal trial to his Response to the I.G.'s supplemental brief. The transcript excerpts were also unmarked. I have marked these exhibits to conform to the requirements of my prehearing order. I have marked Petitioner's Exhibits as follows: Ex. #A is now P. Ex. 1; Ex. B is now P. Ex. 2; the March 7 letter to Michael T. Dyer is P. Ex. 3; the affidavit of Petitioner's attorney is P. Ex. 4; the transcript excerpts together constitute P. Ex. 5.

Petitioner was so convicted, whether the conviction relates to the delivery of an item or service under Medicare.

III. Findings of Fact and Conclusions of Law

1. Petitioner is a physician who practiced in Alton Illinois and operated Doctors Clinic there.

2. In an indictment filed in the United States District Court for the Southern District of Illinois (District Court) on or about March 18, 1993 (indictment), a Grand Jury charged Petitioner with 40 counts of mail fraud. I.G. Ex. 2.

3. After a jury trial in the District Court, Petitioner was found guilty of 33 counts of mail fraud. I.G. Ex. 3 at 1, I.G. Ex. 8 at 11-14.

4. On October 11, 1995, the District Court entered judgment against Petitioner. I.G. Ex. 3 at 1.

5. The District Court sentenced Petitioner to 24 months' incarceration and to pay $1,650 in assessments, $25,000 in fines, and $41,460.98 in restitution. I.G. Ex. 3 at 5.

6. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i) of the Social Security Act. Findings 2-5.

7. Petitioner's conviction is currently on appeal to the United States Court of Appeals for the Seventh Circuit. P. Stay Br. at 1.

8. The fact that Petitioner's conviction is on appeal is irrelevant to my determination that Petitioner has been convicted within the Social Security Act's definition.

9. Count 14 of the indictment charged, among other things, that Petitioner had knowingly and intentionally mailed or caused to be mailed false, fraudulent, and fictitious correspondence, claim forms, and billings regarding patient L.F. from Doctors Clinic to the Medicare Part-B Carrier, Blue Shield of Illinois, P.O. Box 1210, Marion, Illinois.[6] I.G. Ex. 2 at 34.

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[6] In this Decision, I refer to the patients by their initials to protect their privacy.

10. Count 17 of the indictment charged, among other things, that Petitioner had knowingly and intentionally mailed or caused to be mailed false, fraudulent, and fictitious correspondence, claim forms, and billings regarding patient L.G. from Doctors Clinic to the Medicare Part-B Carrier, Blue Shield of Illinois, P.O. Box 1210, Marion, Illinois. I.G. Ex. 2 at 39.

11. Count 29 of the indictment charged, among other things, that Petitioner had knowingly and intentionally mailed or caused to be failed false, fraudulent, and fictitious correspondence, claim forms, and billings regarding patient E.M. from Doctors Clinic to the Medicare Carrier, Travelers Insurance Company, P.O. Box 10066, Augusta, Georgia. I.G. Ex. 2 at 58.

12. The jury found Petitioner guilty of counts 14, 17, and 29 of the indictment. I.G. Ex. 3 at 1; I.G. Ex. 8 at 5, 7.

13. Petitioner's conviction is related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1) of the Act. Findings 9-12.

14. The Secretary of DHHS (Secretary) has delegated to the I.G. the authority to exclude individuals from participation in Medicare and to direct their exclusion from participation in Medicaid. 48 Fed. Reg. 21,662 (1983); 53 Fed. Reg. 12,993 (1988).

15. The I.G. was required to exclude Petitioner from participation in Medicare and Medicaid for at least five years. Act, sections 1128(a)(1), 1128(c)(3)(B).

16. By law, an exclusion imposed pursuant to section 1128(a)(1) of the Act takes effect 20 days after notice to the excluded party. 42 C.F.R. § 1001.2002(b).

17. The administrative law judge is not authorized to delay the effective date of an exclusion imposed pursuant to section 1128(a)(1) of the Act.

18. The administrative law judge is not authorized to declare statutes or regulations unconstitutional.

IV. Discussion

The I.G. excluded Petitioner from participation in Medicare and directed that Petitioner be excluded from participation in Medicaid, pursuant to section 1128(a)(1) of the Act. As a preliminary matter, Petitioner has argued that his exclusion should be stayed pending the outcome of the appeal of his criminal conviction to the

U.S. Court of Appeals for the Seventh Circuit. I conclude that I lack authority to stay Petitioner's exclusion. Therefore, Petitioner's exclusion remains in full force and effect unless I conclude that the I.G. lacked a basis for imposing the exclusion. To establish a basis for Petitioner's exclusion, the I.G. must prove that (1) Petitioner was convicted, under federal or State law, of a criminal offense, and (2) the conviction related to the delivery of an item or service under Medicare or Medicaid. I find that the I.G. has proved both elements. Therefore, Petitioner's five-year exclusion is required as a matter of law.

A. I lack authority to stay the effect of Petitioner's exclusion under the circumstances of this case.

Petitioner argues that, by regulation, the effect of his exclusion is automatically stayed pending my decision on his request for a hearing in this case. Petitioner contends that 42 C.F.R. §§ 1001.2003(b)(2) and 1005.22(a) compel this conclusion. Petitioner misconstrues both regulations.

The I.G. correctly points out that 42 C.F.R. § 1001.2003 does not apply to mandatory exclusions imposed pursuant to section 1128(a) of the Act. I.G. Br. at 8. Petitioner's strained reading of section 1001.2003 fails to recognize that the regulation sets forth exceptions to the general rule governing the effective date of exclusions. The general rule, which is found at 42 C.F.R. § 1001.2002(b), provides that exclusions take effect 20 days after the date of the I.G.'s notice imposing the exclusion. By contrast, when the I.G. seeks to impose an exclusion based on sections 1001.901, .951, .1601, or .1701 of the regulations, a timely request for a hearing by an affected individual will delay imposition of the exclusion until an administrative law judge issues a decision upholding the I.G.'s determination to exclude. 42 C.F.R. § 1001.2003(b). Section 1001.2003(b) is inapplicable to the present case because Petitioner's exclusion was not imposed pursuant to any of the enumerated regulatory sections, but was imposed pursuant to section 1001.101.

The effective date of Petitioner's exclusion is governed by 42 C.F.R. § 1001.2002. Like other exclusions governed by section 1001.2002, Petitioner's exclusion is derivative of an action taken by another fact-finder, in this case, his conviction in the District Court. Both Congress and the Secretary have determined that individuals who have been convicted by courts or sanctioned by State agencies for certain types of

misconduct should be presumed to be untrustworthy to participate in Medicare and Medicaid.

The Secretary has established a regulatory scheme in which no exclusion takes effect before an excluded party has had the opportunity to contest in a due process hearing the determination that the party engaged in conduct demonstrating untrustworthiness. Thus, the regulations establishing the effective dates of exclusions treat separately derivative exclusions based on prior criminal or administrative sanctions (governed by section 1001.2002), and those described in section 1001.2003, in which the I.G. seeks an exclusion based on facts which have not previously been established in judicial or administrative proceedings. Where an individual has been convicted or has had a professional license revoked, the individual has been afforded the right to a due process hearing in another forum. In such cases, the exclusion takes effect 20 days after notice and remains in effect pending any administrative law judge hearing. On the other hand, where the I.G. seeks to exclude an individual or entity based on alleged wrongdoing that has not been the subject of prior findings by a court or administrative agency, an individual who requests a hearing will not be excluded until after an administrative law judge determines that the I.G. has proven a factual basis for the exclusion.

In the present case, Petitioner was convicted after a lengthy trial in the District Court. The I.G. is entitled to rely on that conviction as establishing Petitioner's untrustworthiness. Pursuant to 42 C.F.R. § 1001.2002, Petitioner remains excluded pending my ruling on his request for a hearing.

Petitioner's reading of 42 C.F.R. § 1005.22 is equally inapposite. Petitioner argues that this regulation allows, or perhaps mandates, that Petitioner's exclusion be stayed pending judicial review. P. Stay Br. at 4. Petitioner acknowledges that the regulation, by its terms, applies to civil money penalty (CMP) cases. Nevertheless, Petitioner argues that the phrase "any penalty" in section 1005.22(b)(1) should be read to apply to exclusions, as well. I disagree. The context demonstrates that the phrase refers to a CMP. But even if the regulation could be read to apply to exclusions, subsection (a) contemplates a stay of enforcement pending appeal of the administrative law judge's decision to an appellate panel of the Departmental Appeals Board (DAB). Similarly, subsection (b)(1) describes a process for requesting a stay of any appellate panel decision pending appeal to a federal court. Thus, section 1005.22 contains no provision for implementing a stay of

penalties during the pendency of proceedings before an administrative law judge.

Petitioner argues also that section 705 of the Administrative Procedure Act authorizes me to stay the effect of Petitioner's exclusion "when justice so requires." P. Stay Br. at 2. According to Petitioner, justice requires that his exclusion be stayed because he will suffer irreparable harm if he is excluded. I conclude that section 705 does not authorize me to stay Petitioner's exclusion. Moreover, even if I had such authority, I would not find that Petitioner has proved that he would suffer irreparable harm.

Section 705 of the Administrative Procedure Act provides that when an agency finds that justice so requires, the agency may postpone the effective date of action taken by it, pending judicial review. Plainly, the Secretary has authority to stay the effect of an exclusion, should she find that justice so requires. However, the Secretary has not delegated plenary authority to administrative law judges to take all actions on behalf of the Secretary. The limits of the Secretary's delegation of authority to administrative law judges are set forth at 42 C.F.R. § 1005.4. Nothing in that regulation states or suggests that the Secretary has delegated to administrative law judges the authority to stay exclusions. On the contrary, 42 C.F.R. § 1005.4(c)(4) specifically states that administrative law judges do not have authority to enjoin any act of the Secretary. Pursuant to this section, I lack authority either to enjoin the imposition of an exclusion or to stay the exclusion once it is imposed. See David A. Barrett, DAB CR288 (1993); see also, prehearing order in Barrett (Docket No. C-93-113, September 8, 1993) (Leahy, Administrative Law Judge).

Even if I had authority to grant a stay, I would not find that justice requires such a stay in this case. Petitioner's argument that he would suffer irreparable harm if I do not stay his exclusion appears to be based on his fear that he will lose his right to be reinstated to Medicare participation if his conviction should be reversed after I have issued a decision upholding the I.G.'s decision to exclude him. This concern is unfounded. The regulations provide for reinstatement of individuals if their convictions are reversed or vacated. See 42 C.F.R. § 1001.3005. Therefore, I conclude that Petitioner's argument that he would suffer irreparable harm is without merit.

For these reasons, I conclude that Petitioner's arguments that the effect of his exclusion should be stayed pending the outcome of his appeal to the Seventh Circuit are without merit. Therefore, I will proceed to consider the

I.G.'s authority to impose the exclusion at issue in this case.

B. Petitioner has been convicted of a criminal offense.

The evidence submitted by the I.G. demonstrates that Petitioner was convicted of a criminal offense, as defined under the Social Security Act. Section 1128(i) defines the term "convicted" to include the following dispositions of criminal cases:

> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
>
> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
>
> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

After a trial in the District Court, a jury returned guilty verdicts against Petitioner on 33 counts of mail fraud. Finding 3. Based on those verdicts, the trial judge found Petitioner guilty on those counts. In addition, the court entered a judgment of conviction against Petitioner on October 11, 1995. Finding 4. Thus, Petitioner's conviction falls within the definition of section 1128(i)(1) of the Act, in that a judgment of conviction has been entered against him by a federal court. In addition, Petitioner's conviction is within the definition of section 1128(i)(2) because the District Court found Petitioner guilty.

Petitioner has not explicitly argued that he was not convicted. However, an element of Petitioner's argument that he should not be excluded until after the Court of Appeals has ruled on his criminal appeal appears to be that his conviction is not "final." Petitioner seems to contend that a conviction which has been appealed ought not to be the basis for an exclusion until all appeals have been exhausted. P. Stay Br. at 3. In support of

this argument, Petitioner cites several decisions of Illinois State courts. Id.

Petitioner's argument is not persuasive. Federal regulations specifically authorize the I.G. to proceed based upon convictions, "regardless of whether . . . [t]here is a post-trial motion or an appeal pending." 42 C.F.R. § 1001.2. Thus, whether or not Illinois State courts would treat Petitioner's conviction as final, I am bound by the federal definition of conviction found in the Social Security Act and the applicable regulations. For these reasons, I conclude that Petitioner was convicted within the meaning of the Act, despite the fact that his appeal is pending before the Seventh Circuit.

C. Petitioner's conviction was related to the delivery of an item or service under Medicare.

I have concluded that Petitioner was convicted of a criminal offense, within the meaning of the Social Security Act. The criminal offenses of which Petitioner was convicted were 33 counts of mail fraud. A conviction for mail fraud may not, on its face, appear related to the delivery of an item or service under Medicare. However, in determining whether or not Petitioner's conviction is program-related, I am not limited to considering the formal designation of the criminal statute an individual was convicted of violating. Instead, I may inquire into the conduct which led to the conviction. As an appellate panel of the DAB held in DeWayne Franzen, DAB 1165 (1990), in determining whether a conviction is program-related, the administrative law judge may appropriately look beyond the four corners of the trial court's judgment:

> [T]he ALJ, the finder of fact, can look beyond the findings of the . . . court to determine if a conviction was related to [a federal program]. Therefore, the ALJ's characterization of an offense is not limited to the . . . court's or the violated statute's precise terms for purposes of determining whether a conviction related to [a federal program].

Id. at 6. See also H. Gene Blankenship, DAB CR42 (1989) (Docket No. C-67). Thus, I am authorized to inquire into the circumstances surrounding Petitioner's conviction to determine whether it was program-related. In this case, the circumstances surrounding Petitioner's conviction convince me that it was "related to the delivery of an item or service" under Medicare.

In the present case, the indictment charged, and the jury concluded, that, in three instances, Petitioner knowingly mailed or caused to be mailed false and fraudulent claims to Medicare Part B Carriers seeking reimbursement for health care services provided to Medicare beneficiaries. Such conduct is plainly related to the delivery of Medicare items or services.

Petitioner argues that the evidence produced by the I.G. fails to establish that Petitioner's conviction relates to the delivery of an item or service under Medicare. Petitioner argues that the indictment offered by the I.G. as I.G. Ex. 2 does not accurately reflect the offenses of which Petitioner was convicted. P. Ex. 4. Based on Petitioner's argument and the affidavit which is in evidence as P. Ex. 4, I ordered that the parties supplement the record in this case. The parties submitted supplemental briefs and exhibits. In his supplemental response, Petitioner continues to assert that the I.G. failed to prove that the offenses of which Petitioner was convicted related to the Medicare program. The I.G. moved to further supplement the record and I granted the motion and admitted in evidence I.G. Ex. 8. I.G. Ex. 8 is a copy of the transcript of the portion of Petitioner's criminal trial at which the jury's verdicts were read. I conclude that this exhibit is sufficient to prove, by a preponderance of the evidence, that Petitioner was convicted of offenses that are related to the delivery of items or services under Medicare. Petitioner has offered no evidence or argument to rebut the contents of I.G. Ex. 8.

I.G. Ex. 8 demonstrates that the jury found Petitioner guilty on counts 14, 17, and 29 of the indictment. Those counts involved patients L.F., L.G., and E.M. Each of those counts charged that Petitioner submitted false and fraudulent claims to the Medicare Carrier in connection with his treatment of the named patients. It is well-settled that submitting false claims for Medicare reimbursement is related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1).

In Douglas Schram, R.Ph., DAB 1372 (1992), an appellate panel of the DAB held that submitting a false claim to Medicaid is related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. The Board reasoned:

> By submitting a claim . . . seeking payment or allowance, an individual or entity is representing that an item or service has been (or will be) delivered under the program for which payment or allowance is due.

Id. at 8. See also Jack W. Greene, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 & 838 (E.D. Tenn. 1990). Thus, in the present case, Petitioner's conviction is related to the delivery of items or services under Medicare because in submitting or causing to be submitted false claims to the Medicare Carrier, Petitioner falsely represented that he had provided services to beneficiaries for which he was entitled to be compensated by the Medicare program.

D. I lack authority to declare unconstitutional statutes or regulations.

Petitioner argues finally that imposition of an exclusion before he has been afforded a hearing violates his right to due process under the Constitution. As I have discussed at length in section A. of this Decision, the I.G. has excluded Petitioner based on Petitioner's conviction in the District Court of 33 counts of mail fraud. It can hardly be said that Petitioner was deprived of due process, having been afforded a trial of more than four months' length, after which he was found guilty, beyond a reasonable doubt, of having committed mail fraud directed at the Medicare program. Thus, I do not find persuasive Petitioner's argument that his exclusion prior to hearing violates his constitutional right to due process. Nevertheless, even were I persuaded of the merits of Petitioner's constitutional arguments, I do not have the authority to decide the constitutional validity of an exclusion imposed and directed in accordance with the Act and regulations. Lee G. Balos, DAB 1541, at 9 (1995); Shanti Jain, M.D., DAB 1398, at 7 (1993). The Act and regulations do not entitle Petitioner to a pre-exclusion hearing. The Act and regulations give Petitioner only the right to request a hearing on the issue of whether there is a basis for his exclusion. 42 C.F.R. § 1001.2007. I have afforded Petitioner the hearing (based on the written record) contemplated by the Act and regulations.

V. Conclusion

The I.G. properly imposed and directed against Petitioner a five-year minimum mandatory period of exclusion from participation in Medicare and Medicaid.

/s/

Jill S. Clifton

Administrative Law Judge